United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7368

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

JAMES C. JONES, GLORIA DE BERRY, MARY J. ECCLES, CHARLOTTE JEFFERSON, ANDREW P. JACKSON, each individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

THE NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; JULE M. SUGARMAN, individually and in his capacity as Administrator of the New York City Human Resources Administration; THE NEW YORK CITY DEPARTMENT OF PERSONNEL; THE NEW YORK CITY CIVIL SERVICE COMMISSION; HARRY I. BRONSTEIN, individually and in his capacities as Director of the New York City Department of Personnel and Chairman of the New York City Civil Service Commission; and JAMES W. SMITH and DAVID STADTMAUER, each individually and in his capacity as Civil Service Commissioner,

Defendants.

BRIEF OF PLAINTIFFS-CROSS-APPELLANTS

DOROTHY WILLIAMS, JOHN GOYCO and JOHNNIE McCOY, each individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

THE NEW YORK CITY HUMAN RESOURCES ADMINISTRATION, JULE M. SUGARMAN, individually and in his capacity as Administrator of the New York City Human Resources Administration; THE NEW YORK CITY DEPARTMENT OF PERSONNEL; THE NEW YORK CITY CIVIL SERVICE COMMISSION; HARRY I. BRONSTEIN, individually and in his capacities as

Director of the New York City Department of Personnel and Chairman of the New York City Civil Service Commission; and JAMES W. SMITH and DAVID STADTAMAUER, each individually and in his capacity as Civil Service Commissioner,

Defendants.

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JURISDICTION

Jurisdiction is based on 28 U.S.C. §§1343(3) and (4), and the Fifth and Fourteenth Amendments

STATEMENT OF THE CASE

These employment discrimination class actions were commenced on September 5, 1973 and January 4, 1974, respectively by the filing of Plaintiffs' complaints under 42 U.S.C. §1981 and 1983 and the Fifth and Fourteenth Amendments to the Constitution of the United States. The essential complaints were that examinations numbered 1631, 2013, 1097, 1099 and 1626 given for promotion or appointment to the positions of supervising Human Resources Specialist (HRS), Senior HRS, and HRS were unlawful in that they had a discriminatory impact upon Blacks and Hispanics and could not be shown to be job-related.

With the filing of these complaints, the District Court entered Temporary Restraining Orders restraining defendants from making any permanent appointments to the positions of Supervising HRS, Senior HRS and HRS; and from terminating or otherwise interfering with the provisional appointments of the named plaintiffs and those members of the classes who are provisional Supervising HRS, Senior HRS or HRS employees, pending adjudication of the merits of

these suits by the court.

After trial, the District Court declared the examinations unconstitutional and permantly enjoined the defendants from making permanent appointments from eligibility lists based on their results and from terminating the provisional appointments of those in plaintiffs' class. The District Court denied plaintiff's prayer for counsel fees.

Plaintiffs now appeal to this Court from that part of the judgment denying plaintiffs counsel fees.

QUESTIONS PRESENTED

1. Whether prevailing plaintiffs suing under 42 USC §§1983 and 1981 are entitled to attorneys' fees as a matter of course.

2. Whether plaintiffs should be awarded counsel fees under the federal courts equitable powers to award counsel fees in "common benefit" cases.

3. Whether the District Court abused its discretion in denying plaintiffs attorneys' fees on the grounds of an absence of bad faith on the part of the defendants.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitutional Amendment V (see Appendix)

United States Constitutional Amendment XIV Sec. I (see Appendix)

STATUTES INVOLVED

42 U.S.C. 1981 (see Appendix)

42 U.S.C. 1983 (see Appendix)

STATEMENT OF THE FACTS

The Human Resources Administration (HRA), a "super-agency" of the City of New York, was created in 1966 in order to coordinate and administer the varied city programs dealing with poverty and social services. Plaintiffs in these two consolidated actions challenged five civil service examinations for positions in the Human Resources Specialist (HRS) Series. The examinations were found to have a discriminatory impact on Blacks and Hispanics and not to be job-related. The named plaintiffs and the class they represent are Black and Hispanic persons who took and failed one or more of the five examinations challenged here. They sought (1) a declaration of the unconstitutionality of the examinations; (2) an injunction against appointments from the lists based on the results of the examinations; (3) an injunction requiring the creation of constitutionally adequate selection procedures for the positions in question; (4) an injunction requiring the permanent appointment of those presently serving as provisional employees to the positions they now occupy; and (5) counsel fees.

SUMMARY OF ARGUMENT

The law is plain and unequivocal that plaintiffs suing under 42 USC §§ 1981 and 1983 are entitled to the same remedies that are available under other civil rights laws which provide for the award of attorneys' fees as a matter of course.

The law is also clear that prevailing plaintiffs should be awarded counsel fees, under the courts' equitable powers to award counsel fees in "common benefit" cases, unless it would be unjust to do so.

The District Court abused its discretion in denying plaintiffs attorneys' fees on the grounds that defendants had not demonstrated bad faith conduct.

I

PLAINTIFFS ARE ENTITLED TO RECOVER ATTORNEYS' FEES UNDER SECTION 1983 AS A MATTER OF COURSE

The central contention of the Plaintiffs, in the case at bar, is that 42 USC Section 1983 directs the Courts to provide Plaintiffs, suing under that Section, with the same remedies that are available under other civil rights laws, which provide for the award of attorneys' fees as a matter of course.

While there has been considerable litigation regarding the propriety of awarding attorneys' fees under Section 1983, there are no instances in this circuit where any Court has made an analysis of the interrelationship between Section 1983 and Sections 1981 and 1982, or between Section 1983 and Title VII of The Civil Rights Act of 1964. The need for such analysis stems from the original text of Section 1983 which directs the Courts to award the same remedies as are awarded under other civil rights legislation by which attorneys' fees are to be awarded as a matter of course. This view is revealed in Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir., 1971).

> The original text of Section 1983 reads as follows:
>
> "Chap. XXII - An Act to enforce the Pro-

visions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled 'An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication', and the other remedial laws of the United States which are in their nature applicable in such cases.'" (Last emphasis supplied.)

Section 1983 is derived and taken verbatim from the Civil Rights Act of April 20, 1871, Chapter 22, 17 Stat. 13.

The final italicized portion of the original text of Section 1983 makes it quite clear that the remedies provided in this statute are to be the same as remedies provided in other laws "which are in their nature

applicable in such cases."

In comparing the original text of the Act with the text found in 42 U.S.C. Section 1983, it is apparent that the final italicized portion of the original text has been deleted and that there have been minor changes in other phrases employed in the original act.[1/] These changes were made by the commission that compiled all of the Statutes at Large and codified them in the Revised Statutes of 1873-4.[2/] There is nothing in the revisers' annotations or the appendices to the Revised Statutes to indicate that the changes in the original text were made for substantive reasons. Cf. Monroe v. Pape, 365 U.S. 167, 212-13 at note 18 (1961) (Opinion of Frankfurter, J.); Adickes v. Kress & Co., 398 U.S. 144, 203-04 at note 15 (1970) (Opinion of Brennan, J.). Thus, under numerous

1/ Section 1983 of Title 42 reads as follows:

> "Section 1983. Civil action for deprivation of rights.
>
> " Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." (R.S. Section 1979.)

2/ The revisers inserted their version of the Act of April 20, 1971, in the Revised Statutes as Section 1979.

holdings of the Supreme Court, the changes made by the revisers in order to dovetail the Statutes at Large and bring uniformity and continuity of language to the law cannot be taken as changes in the substance of the law. 3/

The original text of Section 1983 is, in our view, dispositive of the issue whether attorneys' fees should be awarded to prevailing plaintiffs suing under Section 1983. The original text directs that plaintiffs, suing under this section, shall have the same rights of appeal and "other remedies provided in like cases in such courts, under the provisions of the act... [April 9, 1866] entitled 'An Act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication'..." Act of April 20, 1871, 17 Stat. 13.

3/ The Supreme Court has held that the Revised Statutes are primarily "a codification of the general statutes then in force and is not lightly to be read as making a change..." United States v. Sischo, 262 U.S. 165, 168-69 (1923). As the Court declared in Anderson v. Pacific Coast S.S. Co., 225 U.S. 187, 199 (1912):

> "[I]t will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed. United States v. Ryder, 110 U.S. 729, 740; United States v. LeBris, 121 U.S. 278, 280; Logan v. United States, 144 U.S. 263, 302; United States v. Mason, 218 U.S. 517, 525."

Section 1 of the Act of April 9, 1866, contains the original text of Sections 1981 and 1982 of Title 42.[4/] Thus, in the original text of Section 1983 Congress directed the courts to award plaintiffs the same remedies that are available under Sections 1981 and 1982.

In addition, the original text of 1983 further directs that plaintiffs shall have the "remedies provided in like cases in such courts under... the other remedial laws of the United States which are in their nature applicable in such cases." 17 Stat. 13. This declaration clearly incorporates the Act of May 31, 1870, 16 Stat. 140. In this Act, Congress sought, inter alia, to protect the voting rights of Blacks. As part of the remedy for violations of Black voting rights, Congress provided for the

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4/ Compare the original text found in 14 Stat. 27 §1 (1866) with Sections 1977 and 1978 of the Revised Statutes of 1973-74 and 42 U.S.C. §§1981, 1982. See Jones v. Mayer, 392 U.S. 409, 422 n.28, 441-42 n.78 (1968). Note also that Section 1 of the Act of April 9, 1866, was re-enacted in the Act of May 31, 1870, 16 Stat. 144 §§ 16, 18.

payment of damages in the "sum of five hundred dollars to the person aggrieved thereby, to be recovered by an action on the case, with full costs, and such allowance for counsel fees as the Court shall deem just ..." 16 Stat. 140 §§2, 3, 4 (emphasis supplied).[5/]

The original text of Section 1983 must also be read to incorporate the modern civil rights acts which are "of their nature applicable in such cases" for it is clear that where a civil rights act of the Reconstruction Period is in issue courts "must accord it a sweep as broad as its language." Jones v. Mayer Co., 392 U.S. 409, 437 (1968); Griffin v. Breckinridge, 403 U.S. 88, 98 (1971). United States v. Price, 383 U.S. 787, 801 (1966). And the legislative history of the Act of 1871 shows that Congress deliberately cast the act in broad terms in order to afford the fullest possible vindication of Fourteenth Amendment rights. In introducing the original text

5/ The full text of these sections is set forth in Appendix A. Section 2 of the Act was ultimately repealed by Congress in the Act of February 8, 1894, 28 Stat. 36, which was passed "to repeal all statutes relating to supervisors of elections and special deputy marshals and for other purposes" (id.). Sections 3 and 4 were declared unconstitutional in United States v. Reese, 92 U.S. 214 (1875). There is no indication that any of these sections were repealed or voided because of the remedial provisions relating to an award of attorneys' fees.

of Section 1983 on the floor of the House of Representatives for debate, Representative Shellabarger, who was Chairman of the House Committee that drafted the act, advised the House:

> "This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and in civilized law monstrous were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and given remedies for their wrongs to all the people. These provisions of the fourteenth amendment are wholly devoted to securing the equality and safety of all the people, as is this section [Section 1], and, indeed, the entire bill." Globe, 42nd Cong., 1st Sess., Part 2, Appendix, at 68 (March 28, 1871).

In addition, modern law requires that the civil rights statutes stemming fromthe Reconstruction Period should be read to incorporate the remedial provisions of modern civil rights legislation. Thus, in Lee v. Southern Home Sites Corp., supra, 444 F.2d at 146, the court held that "[i]n adjudicating the shape of remedies for violations of 42 U.S.C. §§1981, 1982, courts must give weight to the actions of Congress in enacting the sections of the 1964 and 1968 Civil Rights Acts aimed at very similarly defined social problems... [W]here the older statutes are silent,

and where the responsibility for fashioning an effective remedy must be met by the courts, they should look to the policies embodied in the remedial provisions of the more recent statutes as a reference in shaping remedies to the needs of the older statutes."[6/] In light of this general approach to civil rights legislation and in light of Congress' express incorporation of the "other remedial laws of the United States which are in their nature applicable in such cases," the remedies afforded by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, should be treated as incorporated in Section 1983.[7/]

6/ To the same effect, see NAACP v. Allen, 340 F. Supp. 703, 708-710 (M.D. Ala. 1972).

7/ We note that the original text of Section 1983 specifically identifies Sections 1981 and 1982 as being among the remedial statutes to be incorporated and then generally incorporates "other remedial laws of the United States which are in their nature applicable." There can be no question that Title VII, as amended, is "in their nature applicable" to the facts of this case. In Griggs v. Duke Power Co., 401 U.S. 424,436 (1971), the Supreme Court held that Title VII barred the use of standardized tests that are not manifestly job-related. That holding was persuasive, though not controlling, in the case at bar because Title VII governed only private employees. By virtue of the recent amendments bringing public officials under the act, Title VII as construed in Griggs would also afford plaintiffs a remedy in this case

Having demonstrated that Section 1983 incorporates the remedies of Sections 1981 and 1982, and Title VII of The Civil Rights Act of 1964, we need only show now that Title VII provides for an award of attorneys' fees as a matter of course.

Title VII prohibits employers from discriminating against employees and applicants for employment on the basis of race. 42 U.S.C. §2000e-2. As initially enacted in 1964, Title VII's prohibitions reached only private employers, but in 1972 Congress amended the act to bring "governments, governmental agencies, [and] political subdivisions" within the coverage of the act. Section 701(a) of Public Law 92-261, 42 U.S.C. §2000e(a).

From its inception Title VII has provided that "the court, in its descretion, may allow the prevailing party... a reasonable attorney's fee as part of the costs..." 42 U.S.C. §2000e-5 (k). An identical attorneys' fee provision also appears in Title II of the Civil Rights Act of 1964, 42 U.S.C. §2000a-3(b), and the Supreme Court has held that this language requires that attorneys' fees be awarded as a matter of course. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968).

It readily followed that the Newman standard, although announced in a Title II case, would govern Title VII as well. And, in fact, the courts have consistently

relied upon Newman and applied its standard in awarding attorneys' fees to plaintiffs who prevail in equal employment suits brought under Title VII. E.g., Rowe v. General Motors Corp., 457 F.2d 348, n.26, 360 (5th Cir. 1972); Lea v. Cone Mills Corp., 438 F.2d 86, 88 (4th Cir. 1971); Robinson v. Lorillard Corp., 444 F.2d 791, 804 (4th Cir.1971); Hicks v. Crown Zellerbach Corp., 319 F.Supp. 314, 325 (E.D. La. 1970). Cf. Parham v. Southwestern Bell Telephone Co., 433 F.2d 421, 430 (8th Cir. 1970).

When Congress amended Title VII to bring public employers within its coverage, Congress took no steps to alter the attorneys' fee provision. By the time of these amendments, March 24, 1972, the attorneys' fee provision of Title VII, and its identical counterpart in Title II, was well established in the federal courts. Under Title II and Title VII, attorneys' fees were to be awarded to a prevailing party as a matter of course unless it would be unjust to do so. Against this background, Congress took no measures to relieve governmental agencies from the attorneys' fee provision of Title VII. Thus, Title VII now stands as an unequivocal command to the course that attorneys' fee are to be part of the remedy available to public employees, such as those in the case at bar, who have been the object of discriminatory employment practices.

II

PLAINTIFFS SHOULD BE AWARDED COUNSEL FEES UNDER THE COURT'S EQUITABLE POWERS TO GRANT ATTORNEYS' FEES IN COMMON BENEFIT CASES.

While the critical question presented in this case is whether Judge Lasker should have awarded counsel fees as a matter of course, it is also necessary, in light of Alyeska v. The Wilderness Society, 43 U.S. Law Week 4549, to meet the question of whether federal courts still have the equitable powers to grant attorneys fees to the prevailing plaintiff in a section 1983 action, and if so, whether Judge Lasker applied the proper standard in denying plaintiffs counsel fees in the case at bar.

Prior to Alyeska, the principle was well established that a federal court had the authority to award attorneys' fees in a section 1983 type action. Jordan v. Fusari, 496 F.2d 646 (2d Cir., 1974) Bradley v. School Bd., 53 F.R.D. 28, reversed 472 F.R.D. 318 vacated and remanded 94 S. Ct. 2006, 40 L. Ed.2d 476 (1974) LaRaza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972), Brewer v. School of Norfolk, 456 F.2d 943, (4th Cir.,) cert denied 406 U.S. 933 (1972).

The Court in Alyeska, narrowed the authority of federal courts to award counsel fees, but did not overrule

the principle.

The Court held, in Alyeska, that the award of attorneys' fees to a prevailing plaintiff is barred in actions brought pursuant to The Mineral Leasing Act of 1920, 30 U.S.C. 185 (1970) and The National Environmental Policy Act of 1969, 42 USC 4321 et. seq. Neither act provided for the award of counsel fees. The Court reasoned that the absence of statutory authorization permitting the award of counsel fees, limits the discretion of the federal courts in the exercise of their equity powers, in cases of this sort, to sections 1920 and 1923(a) of The Costs Statute[8/] and section 2412(a) of The Judicial Code.[9/]

While the language of the opinion does not restrict the Court's reasoning to the facts of Alyeska, it is fair to conclude from the face of the opinion that the long established exceptions to The American Rule, barring the award of counsel fees to prevailing plaintiffs absent statutory authorization continue to have force. The Court states at 43 U.S. Law Week 4567:

> "To be sure, the fee statutes have been construed to allow, in limited circumstances, a reasonable attorneys' fee to the prevailing party in excess of the small sums permitted by Section 1923.

8/ 28 USC 1920 et. seq.

9/ 28 USC 2412 (a)

> In Trustees v. Greenough, 105 U.S. 527 (1881), the 1853 Act was read as not interfering with the historic power of equity to permit the trustee of a fund or property, or a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys' fees, from the fund or property itself or directly from the other parties enjoying the benefit. That rule has been consistently followed. Central Railroad & Banking Co. v. Pettus, 113 U.S. 116 (1885); Harrison v. Perea, 168 U.S. 311, 325-326 (1897); United States v. Equitable Trust Co., 283 U.S. 738 (1931); Sprague v. Ticonic National Bank, 307 U.S. 161 (1939); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970)' Hall v. Cole, 412 U.S. 1 (1973); ef. Hobbs v. McLean, 117 U.S. 567, 581-582 (1886). See generally Dawson. Lawyers and Involuntary Clients: Attorney Fees From Funds, 87 Harv. L. Rev. 1597 (1974). Also, a court may assess attorneys' fees for the "willful disobedience of a court order... as part of the fine to be levied on the defendant. Toledo Scale Co. v. Computing Sale Co., 261 U.S. 399, 426-428 (1923)." Fleischmann v. Maier Brewing Co., supra, 386 U.S. at 718; or when the losing party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons. ..." F.D. Rich Co., supra, 417 U.S., at 129 (citing Vaughn v. Atkinson, 369 U.S. 527 (1962); cf. Universal Oil Products Co. v. Root Refining Co., 328 U.S. 575, 580 (1946). These exceptions are unquestionably assertions of inherent power in the courts to allow attorneys' fees in particular situations, unless forbidden by Congress, but none of the exceptions is involved here."

Accoringly, this court has equitable powers to grant counsel fees to plaintiffs under circumstances where: 1) there is a common benefit to a class, 2) or where

defendants have acted in bad faith, vexatiously, wantonly, or for oppressive reasons, 3) or where defendants willfully disobey a court order.

Having demonstrated that Alyeska did not foreclose the power of federal courts to award attorneys' fees in appropriate circumstances, we need only to show now that the case at bar is such a case.

It is the plaintiffs contention that the case at bar falls under the "common benefit" exception. The award of attorneys' fees is permissible under this exception to avoid unjust enrichment of a class at the expense of the individual litigants. In Trustees v. Greenough, 105 U.S. 527, 532 (1882) the Supreme Court stated:

> "If the complainant is not a Trustee, he has at least acted the part of a trustee in relation to the common interest... it would not only be unjust to him, but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage. He has worked for them as well as for himself; and if he cannot be reimbursed out of the fund itself, they ought to contribute their due proportion of the expenses which he has fairly incurred."

The Supreme Court endorsed this development in the 1970 case of Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970), a shareholders' derivative action brought under section 14(a) of the Securities Exchange Act of 1934 to dissolve a corporate merger approved by the shareholders on the basis of a misleading proxy statement. The court

stated that fees would be allowed in all cases:

> "where a plaintiff has successfully maintained a suit, usually on behalf of a class, that benefits a group of others in the same manner as himself" at p. 392.

This extension of the common fund doctrine from monetary to non-monetary benefits coupled with a shifting of litigation expenses from the plaintiff, who seeks to vindicate his corporate, political or constitutional rights, to the defendant, who has the wherewithal to pay for the litigation, is now common practice.

The "common benefit" rule has extensively been applied in cases involving the political rights of union members. If it is applicable in cases where union members seek to enforce their political rights in labor unions, and in cases where a citizen seeks to further other public policy objectives, it is certainly applicable in cases where a person seeks to vindicate his constitutional rights. In Alyeska, the court states:

> "And, if any statutory policy is deemed so important that its enforcement must be encouraged by awards of attorneys' fees, how could a court deny attorneys' fees to private litigants in Section 1983 actions seeking to vindicate constitutional rights?" at p. 4569.

This is particularly applicable in situations where parallel statutes exist allowing for attorneys' fees

under similar circumstances. In the instant case, Title VII of the Civil Rights Act of 1964 allows for attorneys' fees.

The analogy to the union cases are instructive here. In Gartner v. Solover, 384 F.2d 348, 354 (3d Cir., 1967) the Court stated:

> "Plainly the federal courts are empowered... to come to the aid of any union member whose civil rights have been infringed upon by the union and to compensate that member for reasonable counsel fees and other expenses resulting from that action."

And in Bakery Workers Int'l Union v. Ratner, 335 F.2d 691, 696 (D.C. Cir., 1964), the Court stated:

> "It is difficult for individual members of labor unions to stand up and fight those who are in charge. The latter have the treasury of the union at their command and the paid union counsel at their beck and call while the member is on his own... An individual union member could not carry such a heavy financial burden. Without counsel fees the grant of federal jurisdiction is but a gesture for few union members could avail themselves of it."

In Hall v. Cole, 412 U.S.1, 8-9 (1973), the Supreme Court reaffirmed the common benefit approach used in Mills. The suit was brought by a union member claiming that his right to free speech had been infringed by the union. Justice Brennan's opinion explained the benefit conferred:

> "There can be no doubt that, by vindicating his own right of free speech..., respondent

> necessarily rendered a substantial service to his union as an institution and toall of its members. When a union member is disciplined for the exercise of any of the rights protected by Title I, the rights of all members of the union are threatened. And by vindicating his own right, the successful litigant dispels the "chill" cast upon the rights of others... Thus, as in Mills, reimbursement of respondent's attorneys' fees out of the union treasury simply shifts the costs of litigation to 'the class that has benefited from them and that would have had to pay for them had it brought the suit.'"

More importantly, the trial judge in Jordan v. Fusari, 496 F.2d. 646 (2d Cir., 1974) awarded attorneys' fees in a Section 1983 class action on the "common benefit" theory to the successful plaintiffs. The Second Circuit, while accepting the authority of the district court to award attorneys' fees in a Section 1983 class action on the common benefit theory was in doubt as to the method of recovery.[10/] On appeal the plaintiffs argued for the first time alternative theories - the private attorney general approach espoused in Newman v. Piggie Park Enterprises, 309 U.S. 400, 402 (1968) and the "bad faith" or "obdurate obstinacy" approach expounded in Stolberg v. Members of Bd of Trustees

10/ There was a question as to whether the Eleventh Amendment barred a deduction for attorneys' fees from the unemployment compensation fund recovery.

for State College of Connecticut, 474 F. 2d 485 (2d Cir., 1973). The Second Circuit remanded these issues to the District Court stating that the appellants new contentions might "well justify a judgment imposing reasonable attorneys' fees on defendant, without deduction from the awards to plaintiffs' class." at pp. 650-651.

Absent a good faith showing on the part of the defendants, the Second Circuit in Stolberg stated:

> "Under these circumstances, where the constitutional rights of the appellant were clear at the time of appellee's conduct, as well as at the time of suit, where the long course of vindication of these rights caused by the appellees showed, as a consequence, have been unnecessary, and where the award of fees will help prevent inhibition of the future exercise of such rights at public institutions by other public employees, the financial burden of litigation should be removed from the shoulders of the plaintiff seeking to vindicate the public right. Knight v. Anciello, 453 F. 2d 852 (1st Cir., 1972). See also Lee v. Southern Home Sites Corp., 444 F.2d 143, 147-148." at p. 491

In Bridgeport Guardians v. Members of the Civil Service Commission, 497 F. 2d 1113 (2nd Cir., 1974) the Court, while denying the award of attorneys' fees, acknowledged that the court was not barred from awarding counsel fees in Section 1983 actions. While not commenting on the standard the Trial Court used in denying the award, the Second Circuit intimated part of the consideration should be "the con-

tribution made by counsel for plaintiffs, as well as the reasonableness of the resistance to the plaintiffs' claims by the defendants." at p. 1115.

In Kirkland v. N.Y. State Dept. of Correctional Services, 374 F. Supp 1361 (S.D.N.Y., 1974), another Section 1983 case, Judge Lasker awarded counsel fees to the prevailing plaintiff. The court stated at p. 1380:

> "The fact that this suit was not brought under the Civil Rights Act of 1964, which specifically provides for the award of attorneys' fees, but rather under 42 USC Sections 1981 and 1983 which do not so provide, does not mandate a different result."

The applicable law, as the foregoing analysis shows, in "common benefit" cases, indicates that the following factors are controlling: 1) infringement of a statutory or constitutional right, 2) a plaintiff who is part of a class whose rights have been infringed, 3) an unjust enrichment of substantial benefits to some members of the class at the expense of the plaintiff, 4) a successful suit to vindicate said rights, 5) a powerful or financially sound defendant, and 6) the acquisition of a heavy financial burden in attorneys' fees by the plaintiff.

Plaintiffs, in the case at bar brought this action on behalf of themselves and others similarly situated. Substantial benefits accrued to hundreds of employees. The plaintiffs have incurred and are responsible for thousands of

dollars in legal fees. It would clearly be unjust, to the prevailing plaintiffs, to bear the entire burden of this litigation, Trustees v. Greenough, supra, and Mills v. Electric Auto-Lite Co., supra, which was brought to vindicate the constitutional rights of hundreds of public employees. Stolberg v. Members of Bd of Trustees for State College of Connecticutt, Supra.

In Stanford Daily v. Zarcher, 366 F. Supp. 18 (N.D. Cal., 1973), the Court stated:

> "Where as here fee shifting is necessary to insure the vindications of important constitutional rights and appropriate because of the inadequate remedies otherwise available, because it is consistent with a remedy increasingly furnished by Congress, and because of the high social value placed upon the rights involved, an award of attorneys' fees as costs is essential, lest these important rights be relegated to a mere platitude." at p. 24.

The concern here is that without an award of counsel fees, the rights protected by law would not be capable of adequate implementation or vindication. In other words, plaintiffs would normally have been unable to seek judicial protection absent the possibility of fee shifting.

Moreover, where public enforcement is inadequate or non-existent (for whatever reasons) for the protection of constitutional rights, then it is essential to award litigants, who are in essence doing the job of public enforce-

ment for the government, counsel fees. More importantly, where constitutional rights are concerned, it is crucial that the plaintiffs be able to afford adequate representation in order to serve the interests of the Court in such litigation. To hold otherwise, is to create a "double standard" with respect to a "Poor man's" constitutional rights vis a vis a "rich man's" constitutional rights.

Furthermore, it is unreasonable to suggest, through the denial of counsel fees, that the protection of Constitutional rights should be any less under Section 1983 than under any of the statutory provisions allowing for the award of attorneys' fees.

III

JUDGE LASKER ABUSED HIS DISCRETION IN DENYING PLAINTIFFS ATTORNEYS' FEES ON THE GROUNDS OF AN ABSENCE OR BAD FAITH CONDUCT ON THE PART OF THE DEFENDANTS.

Defendants in this case have a Constitutional duty not to discriminate in employment, and consequently knew or should have known, that the said examinations were discriminatory on their face. Since 1972 defendant have been under an obligation not to utilize discriminatory examinations in employment. Chance v. Board of Examiners, 458 F.2d 1167 (2nd Cir., 1972), Vulcan Society v. Civil Service Commission, 490 F.2d 387 (2d Cir., 1973), Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission, 482 F.2d 1333 (2d Cir., 1973), Castro v. Beecher, 459 F.2d (1st Cir., 1972).

Yet, in the face of these clear duties, defendants continued to utilize non job-related examinations which had a discriminatory impact on Black and Hispanic employees. Defendants conduct, or lack of it, is sufficient indication of their "unreasonableness" and "obdurate obstinacy," and, by definition, "bad faith" conduct.

The crucial question here is not the presence of unconstitutional or bad faith conduct, but rather when did

it occur?

While Judge Lasker implies that the "bad faith" conduct standard applies after issue is joined and litigation commences, or post-trial conduct of the defendants with respect to the obeyance of a Court Order, the Supreme Court does not view application of the standard to such a narrow period of time. In Hall v. Cole 412 U.S. 1, 15, the Supreme Court stated:

> "It is clear, however, that 'bad faith' may be found not only in the actions that led to the lawsuit, but also in the conduct of the litigation."
> (emphasis added)

Consequently, if "bad faith" conduct may be found... "in the actions that led to the lawsuit," which, in their absence, would have made this litigation unnecessary, this Court is under a duty to so rule. To hold otherwise is to deny the existence of such conduct, contradicting the finding that discrimination existed. The only other conclusion one could draw is that the pre-trial unconstitutional conduct is either excused or accidental.

The obdurate nature of defendant's conduct is further manifested in this continued pattern of willingness to litigate employment discrimination cases. See Chance v.

Board of Examiners, supra, and Vulcan Society v. Civil Service Commission, supra.[11] Rather than changing the examinations, defendants put the plaintiffs through costly litigation, including costly pre-trial discovery proceedings, in order to vindicate their constitutional rights.

In short, defendants pre-trial conduct, in the light of their constitutional and other legal duties, constitute unreasonable and obdurate obstinacy within the meaning of the "bad faith" tests. Consequently, Judge Weinfeld abused his discretion with respect to defendants' bad faith conduct.

11/ In both of these cases, essentially the same defendants as are defendants here were found guilty of unconstitutional discrimination in the preparation and administration of Civil Service examinations and selection procedures. Chance was decided during the preparation of the examinations subsequently declared unconstitutional in the case at bar. Vulcan was decided during the pendency of this law suit. Nevertheless, it does not appear that the City varied its procedure in any material respect, either in preparation of the examinations or in their litigation in an attempt to avoid and correct the unconstitutional abuses which was subsequently proved to obtain here and which had already been established in Chance and Vulcan.

CONCLUSION

For the reasons set forth above, the judgment held below should be reversed insofar as it denied plaintiffs' request for counsel fees, and the matter remanded to the court below for the purpose of making an award of counsel fees, and granting such other relief as may be proper in the premises.

Respectfully submitted

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Dated: August 27, 1975

Of Counsel
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APPENDIX

Statutes:

§1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

R.S. §1977.

S1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities s cured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

U.S. Constitutional Amendments:

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of August, 1975, I caused to be served a copy of the foregoing Memorandum of Law upon the following Counsel of record, by deposit of same in the United States mail, postage prepaid:

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